

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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WILLIAM VASQUEZ,

96 CV 4656

91 CR 0484

Petitioner,

MEMORANDUM

AND

ORDER

- - against -

UNITED STATES OF AMERICA,

Respondent.

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WILLIAM VASQUEZ

Reg. No. 53174-079

P.O. Box 1000

Leavenworth, KS 66048-1000

Petitioner pro se.

ZACHARY W. CARTER

United States Attorney, Eastern District of New York

(Mark W. Lerner, Assistant United States Attorney,  
of counsel)

1 Pierrepont Plaza

Brooklyn, New York 11201

for Respondent

NICKERSON, District Judge:

Petitioner brought this proceeding under 28 U.S.C.  
§ 2255 for a writ of habeas corpus.

Petitioner was charged in a two count indictment  
with conspiracy to distribute and the distribution of  
cocaine. In April 1992, he was tried before this court  
with his co-conspirator Dominick Grimaldi. Two  
unindicted co-conspirators, Dominick Farace and Ron

Sahi, testified. The jury found both defendants guilty on both counts.

Petitioner's trial counsel made a post-trial motion, as did petitioner pro se. Counsel argued that (1) the indictment was impermissibly based on hearsay evidence, and (2) Ron Sahi's in-court identification of petitioner was suspect and deprived petitioner of a fair trial. Petitioner's pro se motion claimed that (3) the government used perjured testimony by Farace, thereby depriving petitioner of due process.

This court denied the motions. At sentencing petitioner's counsel objected to the court's finding that petitioner was a career offender and put the government to its proof as to the proper amount of the drugs for sentencing guideline purposes. Based on Farace's testimony at a hearing held on December 23, 1992, this court found that petitioner had trafficked in at least five kilograms of cocaine and that the applicable sentencing guideline range was 360 months to life. The court then departed downward and sentenced petitioner to 235 months.

On appeal petitioner had new counsel who argued that (1) the government impermissibly used hearsay testimony in the grand jury, (2) the evidence was insufficient to establish the substantive narcotics

distribution count, and (3) the sentence was based on an erroneous finding of career criminal status.

In an unpublished summary order the United States Court of Appeals for the Second Circuit affirmed. The United States Supreme Court denied certiorari.

The present petition, filed September 19, 1996, makes six contentions: (1) the proof was insufficient to show petitioner's membership in the conspiracy; (2) the government used perjured testimony in the grand jury and at trial and suppressed exculpatory Brady evidence, and this court erroneously refused to permit defendant to inspect the grand jury minutes; (3) the government offered evidence merely to prove "disposition"; (4) this court improperly found petitioner to be a career offender; (5) this court failed to make the necessary findings of fact as to the reasonably foreseeable drug weight for purposes of the sentence; and (6) petitioner had ineffective assistance of trial and appellate counsel.

None of petitioner's contentions has merit.

His claim that this court erroneously found career offender status was raised on appeal and rejected by the Second Circuit. He may not raise the same claim on habeas corpus.

Petitioner contended on appeal that the evidence was insufficient to sustain the substantive count, and

the Second Circuit rejected that contention. He now says for the first time that the evidence was insufficient to prove the conspiracy. The evidence was plainly sufficient. It included both the evidence that the Second Circuit found adequate to sustain the verdict on the substantive count and additional accomplice testimony that petitioner was his co-defendant's cocaine supplier in numerous other transactions. The jury determined that testimony to be credible.

Contrary to petitioner's claim, this court made findings of fact as to the drug weight attributable to petitioner. From the testimony of Farace the court concluded that the evidence supported a finding that petitioner trafficked in at least five kilograms of cocaine. The court based the sentence on no greater amount.

The government turned over the prior grand jury testimony of witnesses pursuant to 19 U.S.C. § 3500, and disclosed to the defense that Farace had committed perjury in an earlier, separate grand jury proceeding involving a murder by his cousin of a Drug Enforcement Administration agent. Petitioner has offered no proof of perjury by any witness.

It is unclear what petitioner means when he says that the government offered evidence merely to prove

"disposition." Perhaps he is referring to the testimony taken before sentencing. Farace's testimony was properly used to determine the sentence.

The foregoing claims not raised on direct appeal are barred because petitioner does not show adequate cause for the failure to raise them. All of the pertinent facts were known to him at the time he filed his appeal.

Petitioner's claim of ineffective counsel is also barred because it was not raised on appeal. Where an accused is represented on appeal by the same attorney as he had on trial or the resolution of an ineffective assistance claim requires consideration of matters outside the record, the claim is not barred on habeas corpus by failure to raise it on appeal. See Billy-Eko v. United States, 8 F.3d 111 (2d Cir. 1993). But if, as here, the accused was represented on appeal by new counsel and the claim of ineffective counsel is based on a fully developed trial court record, that claim must be raised on appeal and may not be heard on habeas corpus. Id. at 114-5.

In this case petitioner had new counsel on appeal and all the present contentions are based on the factual record in this court.

In his ineffective assistance claim petitioner asserts that trial and appellate counsel were not

knowledgeable as to the existing Second Circuit and United States Supreme Court decisions or the "clarifications" of the Sentencing Guidelines. This contention has no merit, and moreover, it may not now be heard. Where no factual information has come to light after the trial that appellate counsel would have needed to substantiate an ineffective assistance argument, there is no excuse for failing to bring a claim on direct appeal. Douglas v. United States, 13 F.3d 43, 48 (2d Cir. 1993).

In any event, an accused seeking to claim that his attorney provided him ineffective assistance must show that the attorney made errors so serious that the representation fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-89 (1984). No such errors were made. This court must indulge in a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Id. at 689. In addition, the accused must show that there is a reasonable probability that, absent the alleged errors, the outcome of the proceeding would have been different. Id. at 695. Petitioner makes no such showing.

This court found petitioner's trial counsel to be well prepared, dedicated, and competent in advocating petitioner's cause.

The petition for habeas corpus is denied.

So ordered.

Dated: Brooklyn, New York  
September 24, 1998

Eugene H. Nickerson  
Eugene H. Nickerson, U.S.D.J.